75-4

No. 75-

Supreme Court, U. S.
FILED
JUL 1 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Petitioner,

v.

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; CONCERNED CITIZENS AGAINST BAILLY NUCLEAR SITE; BUSINESSMEN FOR THE PUBLIC INTEREST, INC.; JAMES E. NEWMAN; ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CHARLES A. HORSKY
888-16th St., N.W.
Washington, D.C. 20006

WILLIAM H. EICHHORN
5243 Hohman Avenue
Hammond, Indiana 46320

MAURICE AXELRAD
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Petitioner

Of Counsel:

SCHROER, EICHHORN & MORROW
5243 Hohman Avenue
Hammond, Indiana 46320

COVINGTON & BURLING
888-16th St., N.W.
Washington, D.C. 20006

June 1975

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
REGULATIONS INVOLVED	3
STATEMENT	7
The Commission Proceedings	7
The Factual Setting	9
The Proceedings Below	12
REASONS FOR GRANTING THE WRIT	13
I. The Decision Below Has So Far Departed From the Accepted Course of Judicial Proceedings and the Prior Decisions of This Court as to Warrant Review	14
II. The Result Achieved by the Decision Below Should Not Be Sanctioned by This Court	20
CONCLUSION	22

TABLE OF AUTHORITIES

CASES:

Alan M. Campbell Co. v. *Lloyd Wood Construction Co.*, 446 F.2d 261 (5th Cir. 1971)	23n.
Borelli v. *Reconstruction Finance Corp.*, 196 F.2d 730 (Emerg. Ct. App. 1952)	23n.
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410	15
Consolidated Edison Co., 5 A.E.C. 43 (1972)	17n.
Consumers Power Co., 5 A.E.C. 214 (1972)	17n.
Egan v. *City of Aurora*, 365 U.S. 514	23

Page

Ehlert v. *United States*, 402 U.S. 99 15
F.H.A. v. *The Darlington, Inc.*, 358 U.S. 84 ..... 23n.
Glidden Co. v. *Zdanok*, 370 U.S. 530 ..... 23n.
Hunter v. *Tennessee*, 403 U.S. 711 23
Johnson v. *Virginia*, 373 U.S. 61 24
Mason v. *City of Biloxi*, 385 U.S. 370 24
N.L.R.B. v. *Bell Aerospace Co.*, 416 U.S. 267 ..... 23n.
Nader v. *Nuclear Regulatory Commission*, — F.2d — (D.C. Cir. May 30, 1975) ..... 15n.
Power Reactor Development Co. v. *I.U.E.*, 367 U.S. 396 15
Rucker v. *Wabash R.R.*, 418 F.2d 146 (7th Cir. 1969).. 23n.
Siegel v. *Atomic Energy Commission*, 400 F.2d 778 (D.C. Cir. 1968) 22
Southern California Edison Co., RAI-74-12 957 (1974) 17
Thorpe v. *Housing Authority*, 393 U.S. 268 15
Thorpe v. *Housing Authority of the City of Durham*, 386 U.S. 670 23
Udall v. *Tallman*, 380 U.S. 1 15
Union of Concerned Scientists v. *Atomic Energy Commission*, 499 F.2d 1069 (D.C. Cir. 1974) 22

STATUTES:

Atomic Energy Act of 1954:
42 U.S.C. § 2014(s) 18
42 U.S.C. § 2241 8

28 U.S.C. § 1254(1) 2

REGULATIONS:

10 C.F.R. § 2.101(b) 18
10 C.F.R. § 2.762 8
10 C.F.R. § 2.785 8
10 C.F.R. § 2.786 8
10 C.F.R. Part 50, App. D (now Part 51) 7
10 C.F.R. § 50.2(1) 18
10 C.F.R. § 50.34 7
10 C.F.R. Part 100 .....14, 18
10 C.F.R. § 100.1 3
10 C.F.R. § 100.1(a) 18
10 C.F.R. § 100.3(c) .....3 *et passim*

Page

10 C.F.R. § 100.10 4
10 C.F.R. § 100.11 5
10 C.F.R. § 100.11(a)(1) and (2) 9
10 C.F.R. § 100.11(a)(3) 9, 10, 16
10 C.F.R. § 100.11(a)(3) as amended June 20, 1975 6-7, 19

MISCELLANEOUS:

Federal Rules of Appellate Procedure, Rule 41(b) 13
27 Fed. Reg. 3509 (1962) 16
40 Fed. Reg. 26526-7 (June 24, 1975) 18-19
U.S. Bureau of the Census, *Census of Housing; 1970 Block Statistics Final Report HC-3*-6B, Chicago, Ill.—Northwest Indiana Urbanized Area (1972) .. 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Petitioner,

v.

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.; CONCERNED CITIZENS AGAINST BAILLY NUCLEAR SITE; BUSINESSMEN FOR THE PUBLIC INTEREST, INC.; JAMES E. NEWMAN; ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The majority and dissenting opinions in the Court of Appeals are reported at — F.2d —, and appear in the Appendix at pages 1-40. The orders of the Court of Appeals upon denial of the petition for rehearing and the suggestion for a hearing *en banc* appear in the Appendix at pages 41-42. The Initial Decision of the Atomic Safety and Licensing Board of the [then]

Atomic Energy Commission of April 5, 1974 appears in the Appendix at pages 43-164, and is reported in Regulatory Adjudication Issuances of AEC, RAI-74-4, 557. The decision of August 29, 1974 of the Atomic Safety and Licensing Appeal Board, affirming the Initial Decision, appears in the Appendix at pages 165-197, and is reported at RAI-74-8, 244.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1975 (App. p. 1). Timely petitions for rehearing and suggestions for rehearing *en banc* were denied on May 28, 1975 (App. pp. 41-42). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

A sharply divided court below,[1] ignoring the principle established by decisions of this Court that an administrative agency's interpretation of its own regulations is controlling unless clearly erroneous, has rejected the consistent interpretation placed by the Atomic Energy Commission—now the Nuclear Regulatory Commission—on its regulations concerning the location of nuclear reactor sites and has set aside a decision by the Commission granting a construction permit for a nuclear power plant despite the court's acknowledgment of its importance to the economic, financial and industrial well-being of northern Indiana. The question presented is whether the decision so far departs from the accepted course of judicial proceedings and controlling decisions of this Court as to warrant

[1] The court's original decision was 2-1. The suggestion for a rehearing *en banc* was denied with four judges in favor, three opposed, and one not participating.

review, particularly since, in light of the enactment by the Commission of a supervening interpretative amendment of the controlling regulation, the error of the court below, although unlikely to be repeated, will result in a unique, unwarranted and unnecessary loss.

REGULATIONS INVOLVED

10 C.F.R. § 100.1 reads as follows:

> "§ 100.1 Purpose
>
> "(a) It is the purpose of this part to describe criteria which guide the Commission in its evaluation of the suitability of proposed sites for stationary power and testing reactors subject to Part 50 of this chapter.
>
> "(b) Insufficient experience has been accumulated to permit the writing of detailed standards that would provide a quantitative correlation of all factors significant to the question of acceptability of reactor sites. This part is intended as an interim guide to identify a number of factors considered by the Commission in the evaluation of reactor sites and the general criteria used at this time as guides in approving or disapproving proposed sites. Any applicant who believes that factors other than those set forth in the guide should be considered by the Commission will be expected to demonstrate the applicability and significance of such factors."

10 C.F.R. § 100.3(c) reads as follows:

> "§ 100.3 Definitions.
>
> "As used in this part:
>
> . . .
>
> "(c) 'Population center distance' means the distance from the reactor to the nearest boundary of

a densely populated center containing more than about 25,000 residents."

10 C.F.R. § 100.10 in relevant part reads as follows:

"SITE EVALUATION FACTORS

"§ 100.10 Factors to be considered when evaluating sites.

"Factors considered in the evaluation of sites include those relating both to the proposed reactor design and the characteristics peculiar to the site. It is expected that reactors will reflect through their design, construction and operation an extremely low probability for accidents that could result in release of significant quantities of radioactive fission products. In addition, the site location and the engineered features included as safeguards against the hazardous consequences of an accident, should one occur, should insure a low risk of public exposure. In particular, the Commission will take the following factors into consideration in determining the acceptability of a site for a power or testing reactor:

"(a) Characteristics of reactor design and proposed operation including:

"(1) Intended use of the reactor including the proposed maximum power level and the nature and inventory of contained radioactive materials;

"(2) The extent to which generally accepted engineering standards are applied to the design of the reactor;

"(3) The extent to which the reactor incorporates unique or unusual features having a significant bearing on the probability or consequences of accidental release of radioactive materials;

"(4) The safety features that are to be engineered into the facility and those barriers that

must be breached as a result of an accident before a release of radioactive material to the environment can occur.

"(b) Population density and use characteristics of the site environs, including the exclusion area, low population zone, and population center distance.

"(c) Physical characteristics of the site, including seismology, meteorology, geology, and hydrology."

Until June 20, 1975, 10 C.F.R. § 100.11 in relevant part read as follows:

"§ 100.11 Determination of exclusion area, low population zone, and population center distance.

"(a) As an aid in evaluating a proposed site, an applicant should assume a fission product release [1] from the core, the expected demonstrable leak rate from the containment and the meteorological conditions pertinent to his site to derive an exclusion area, a low population zone and population center distance. For the purpose of this analysis, which shall set forth the basis for the numerical values used, the applicant should determine the following:

"(1) An exclusion area of such size that an individual located at any point on its boundary for two hours immediately following onset of the postulated fission product release would not receive a total radiation dose to the whole body in excess

---

"[1] The fission product release assumed for these calculations should be based upon a major accident, hypothesized for purposes of site analysis or postulated from considerations of possible accidental events, that would result in potential hazards not exceeded by those from any accident considered credible. Such accidents have generally been assumed to result in substantial meltdown of the core with subsequent release of appreciable quantities of fission products.

of 25 rem [2] or a total radiation dose in excess of 300 rem [2] to the thyroid from iodine exposure.

"(2) A low population zone of such size that an individual located at any point on its outer boundary who is exposed to the radioactive cloud resulting from the postulated fission product release (during the entire period of its passage) would not receive a total radiation dose to the whole body in excess of 25 rem or a total radiation dose in excess of 300 rem to the thyroid from iodine exposure.

"(3) A population center distance of at least one and one-third times the distance from the reactor to the outer boundary of the low population zone. In applying this guide, due consideration should be given to the population distribution within the population center. Where very large cities are involved, a greater distance may be necessary because of total integrated population dose consideration."

On June 20, 1975 (40 Fed. Reg. 26526-7), subparagraph (3) was amended to read as follows:

"(3) A population center distance of at least one and one-third times the distance from the

[2] "The whole body dose of 25 rem referred to above corresponds numerically to the once in a lifetime accidental or emergency dose for radiation workers which, according to NCRP recommendations may be disregarded in the determination of their radiation exposure status (see NBS Handbook 69 dated June 5, 1959). However, neither its use nor that of the 300 rem value for thyroid exposure as set forth in these site criteria guides are intended to imply that these numbers constitute acceptable limits for emergency doses to the public under accident conditions. Rather, this 25 rem whole body value and the 300 rem thyroid value have been set forth in these guides as reference values, which can be used in the evaluation of reactor sites with respect to potential reactor accidents of exceedingly low probability of occurrence, and low risk of public exposure to radiation."

reactor to the outer boundary of the low population zone. In applying this guide, the boundary of the population center shall be determined upon consideration of population distribution. Political boundaries are not controlling in the application of this guide. Where very large cities are involved, a greater distance may be necessary because of total integrated population dose consideration."

See pages 18-19, *infra*.

STATEMENT

This action was brought to review final orders of the Atomic Energy Commission—now the Nuclear Regulatory Commission—authorizing the issuance to petitioner, Northern Indiana Public Service Company (NIPSCO), of a construction permit for a 685-megawatt nuclear plant to be built on petitioner's Bailly site on the southern shore of Lake Michigan in Westchester Township, Porter County, Indiana.

The Commission Proceedings

On August 27, 1970 petitioner made application to the Atomic Energy Commission for a construction permit and operating license for the Bailly Generating Station—Nuclear I (sometimes hereafter referred to as "N-1"), together with a 4000-page Preliminary Safety Analysis Report required by the Commission's regulations (10 C.F.R. § 50.34). The Report was reviewed by the Commission staff and by the statutory Advisory Committee on Reactor Safeguards, both concluding that N-1 can be constructed and operated without undue risk to the health and safety of the public. The Environmental Report, pursuant to 10 C.F.R. Part 50, App. D (now Part 51), was filed on March 22, 1971.

The staff review of environmental matters, including the Environmental Report, culminated in a Final Environmental Statement in February 1973. The Commission staff again concluded that the construction permit for N-1 should be issued, subject to certain conditions for the protection of the environment.

On January 12, 1970 an Atomic Safety and Licensing Board of three members was constituted, pursuant to 42 U.S.C. Sec. 2241, to hold hearings with respect to the radiological health and safety and environmental issues. Six of the present respondents were admitted as Joint Intervenors before the Board.[2] Hearings before the Board, which began in October 1972, occupied 65 days over a period of 14 months, with more than 100 witnesses and thousands of pages of testimony and exhibits. After oral argument on proposed findings, the Board issued its Initial Decision, authorizing the issuance of the construction permit for N-1, on April 5, 1974 (App. pp. 43-164).

Under Commission regulations (10 C.F.R. § 2.762) any party may take an appeal from an initial decision by filing exceptions with the Commission, which are then reviewed for the Commission by an Atomic Safety and Licensing Appeal Board (10 C.F.R. § 2.785). The Joint Intervenors filed exceptions, and after briefs and oral argument before the Appeal Board, it affirmed the Initial Decision on August 29, 1974 (App. pp. 165-197). That decision is the final decision of the Commission (10 C.F.R. § 2.786).

---

[2] Bethlehem Steel Corporation was also admitted as an intervenor before the Board, but is not a respondent here.

The Factual Setting

As the Board and Appeal Board decisions set out in the Appendix show, a large number of health, safety and environmental issues were presented to and disposed of by the Board and the Appeal Board. The court below, however, limited its holding to only one issue—the proper interpretation of the Commission regulations appearing at 10 C.F.R. §§ 100.3(c) and 100.11(a)(3). The court held that the regulations had been administratively misinterpreted, requiring the Appeal Board decision of August 29, 1974 to be set aside. The details with respect to that issue are as follows:

The regulations of the Commission provide that in evaluating a site for a proposed nuclear reactor it will consider three factors—the characteristics of the particular reactor and its proposed operation, the population density and use characteristics of the site environs, and the physical characteristics of the site (10 C.F.R. § 100.10, pp. 4-5, *supra*). The second of these factors —the only one here involved—is dealt with more specifically in 10 C.F.R. § 100.11, pp. 5-7, *supra*. This regulation requires the calculation of the radii of two hypothetical areas surrounding a proposed facility: an exclusion area and a low population zone (10 C.F.R. § 100.11(a)(1) and (2). The determination of these two zones is a complex function of the proposed design of the nuclear reactor and a calculation of the maximum radiation doses that an individual located on the outer boundaries of the zones would receive in the event of a hypothetical accident. The court below, recognizing that the determination of these first two zones "necessarily subsumes the expertise of the AEC in reaching definitive conclusions" (App. pp. 11-12), did

not disturb the Commission's decision with respect to them.

In addition to these two zones, the regulation also provides for a population center distance (10 C.F.R. § 100.11 (a)(3). This is a mathematical function of the size of the second—the low population—zone. This requirement prior to June 20, 1975 was stated in 10 C.F.R. § 100.11(a)(3) as follows:

> "A population center distance of at least one and one-third times the distance from the reactor to the outer boundary of the low population zone. In applying this guide, due consideration should be given to the population distribution within the population center. Where very large cities are involved, a greater distance may be necessary because of total integrated population dose consideration."

"Population center distance" is defined in 10 C.F.R. § 100.3(c) as

> "the distance from the reactor to the nearest boundary of a densely populated center containing more than about 25,000 residents."

Since the boundary of the low population zone was determined by the Commission to be 1.5 miles from the proposed reactor, it is not disputed that the population center distance for N-1—one and one-third times 1.5 miles—is two miles.

The City of Portage, Indiana, had a population under 20,000 in 1970, but was expected by the Commission to have a population exceeding 25,000 by 1980. The political boundary of Portage at its nearest point is 1.1 miles from the proposed reactor. The Licensing

Board, however, rejected the argument that the distance to the political boundary of Portage was controlling for purposes of that regulation. Rather, the Board concluded that the requirements of that regulation were satisfied in light of, *inter alia,* its examination of United States Geological Survey maps, census data, and extensive testimony by both the Regulatory Staff and petitioner, showing the very low population density of those areas within the Portage city limits closer than 4.5 miles from the proposed reactor. The Board's opinion stated (App. pp. 55-56):

> "25. Although there is some argument as to whether the political boundary should be used in determining the population center distance rather than the distance to that portion of the population center at which the dense population starts, the Board notes that 10 CFR Part 100.11(a)(3) specifically provides that 'In applying this guide [that the population center distance be at least one and one third times the distance to the LPZ boundary], due consideration should be given to population distribution within the population center.' The Board concludes that giving due consideration to the low population density of those areas closer than 4.5 miles to the Bailly reactor, principally industrial areas of the City of Portage, the provisions of Part 100 with respect to population center distance are satisfied."

The Appeal Board, in its decision, did not speak directly to the issue, since it was not raised before it by timely-filed briefs (App. p. 37, n. 2). It did, however, note that it had examined those portions of the Initial Decision to which no exceptions were taken or which, though excepted to, were not supported by timely-filed briefs, and found "that the Board made a full, fair and

accurate evaluation of the evidence and reached a conclusion fully warranted by the record before it" (App. p. 197).

The Proceedings Below [3]

On September 13, 1974 the Joint Intervenors petitioned the court below to review and set aside the decision of the Commission. The State of Illinois and the City of Gary, Indiana were allowed to intervene as petitioners, and are respondents in this Court. Petitioner here was allowed to intervene as a respondent.

On April 1, 1975 the court below, by divided vote, set aside the Commission's decision of August 29, 1974. The majority opinion (Fairchild and Sprecher, JJ.) concluded that the Commission's regulations required it to use the political boundary of Portage in determining population center distance, and that since the Commission had not complied with its own regulations its order was unlawful (App. pp 1-34). Having reached that conclusion, the majority, in Part IV of its opinion (App. pp. 17-33), after suggesting that the Commission "has tended to become somewhat lax," discussed several other matters: that the Commission did not appear to have considered the clustering of nuclear power plants around the southern end of Lake Michigan; that it had given insufficient weight to a staff paper; and that it gave inadequate consideration to the effects of the proposed nuclear power plant on the Indiana Dunes National Lakeshore. The discussion of these matters appears to have been regarded by the majority as furnishing "persuasive reasons for requiring [the Commission] to comply" with the

[3] The extensive efforts by respondents to secure stays from the Board and the Appeal Board, and the renewal of those efforts in the court below, are not now relevant.

court's interpretation of the Commission's regulation concerning population center distance (App. pp. 33-34).

Judge Tone, dissenting (App. pp. 35-40), believed that the Commission's interpretation of its own regulations was entitled to be followed. In his view "the location of populated areas rather than of political boundaries . . . is . . . the most sensible interpretation of the regulation, as well as the one to which we owe respect as the agency's expert interpretation" (App. p. 36). If the Commission's findings as to the location of the actual population density were intended to be challenged by the majority, as to which he found the majority opinion unclear, he would disagree. Adequate evidence supported them.

Timely petitions for rehearing and suggestions for rehearing *en banc* were filed by petitioner and by the Commission and the United States. On May 28, 1975 the petitions for rehearing were denied, with a brief order (App. p. 41). The suggestion for a rehearing *en banc* was also denied on the same day, four judges believing it should be granted, three judges of the contrary view, and one judge not participating (App. p. 42). On June 4, 1975 the court granted motions by petitioner and by the Government for stay of mandate for 30 days pending application for certiorari pursuant to Rule 41(b), Federal Rules of Appellate Procedure (App. p. 42).

REASONS FOR GRANTING THE WRIT

A principal purpose of the Atomic Energy Act of 1954 is to establish—

> "a program to encourage widespread participation in the development and utilization of atomic

energy for peaceful purposes to the maximum extent consistent with the common defense and security and with the health and safety of the public;" (Sec. 3(d)).

The program has become of increasing importance in the years since 1954.

The Atomic Energy Commission—now the Nuclear Regulatory Commission—is charged by Congress with insuring that the carrying out of that program is consistent with public health and safety, and it has established criteria to guide its actions, including the site evaluation criteria set forth in 10 C.F.R. Part 100. After elaborate administrative proceedings, the Commission concluded that petitioner had satisfied those criteria, and issued a construction permit. The decision by the majority of the court below that the Commission had misinterpreted its own criteria and hence that its action was unlawful is such a departure from the principles of judicial review established by this Court, and of such consequence, that it should not be sanctioned by this Court. The need for further review is underscored by the fact that a majority of the active judges participating in the court below believed the case should be reheard by that court *en banc*.

I.

THE DECISION BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED COURSE OF JUDICIAL PROCEEDINGS AND THE PRIOR DECISIONS OF THIS COURT AS TO WARRANT REVIEW.

1. The majority decision below holds that the words "the nearest boundary of a densely populated center containing more than about 25,000 residents" in 10 C.F.R. § 100.3(c) required the Commission to deny a permit to petitioner because the political boundary of

the City of Portage was only 1.1 miles from the proposed reactor site. That holding ignores the fact that the Commission, in granting the permit, was construing its own regulation; that the Commission's position is supported by both the language and obvious purpose of the regulation; and that in any event the regulations are criteria to guide the Commission, not to shackle it.

Few standards of judicial review are more firmly established than the principle that when the words of an administrative regulation are susceptible of different meanings, a "court must necessarily look to the administrative construction of the regulation . . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414. Indeed, this Court has applied that principle in an early dispute involving this very agency, holding that the Commission's interpretation of its own regulations is entitled to "that respect which is customarily given to a practical administrative construction of a disputed provision." *Power Reactor Development Co.* v. *I.U.E.*, 367 U.S. 396, 408. Other decisions of this Court to the same effect are legion. *E.g., Thorpe* v. *Housing Authority*, 393 U.S. 268, 276; *Udall* v. *Tallman*, 380 U.S. 1, 16; *Ehlert* v. *United States*, 402 U.S. 99, 105.[4]

---

[4] The principle has recently been applied by the United States Court of Appeals for the District of Columbia Circuit in another Nuclear Regulatory Commission case, Nader v. Nuclear Regulatory Commission, No. 73-1872, — F.2d — (May 30, 1975). "Like the Supreme Court in *Power Reactor*, 'we see no reason why we should not accord to the Commission's interpretation of its own regulations . . . that respect which is customarily given to a practical administrative construction of a disputed provision'" (Slip op. p. 579).

That principle, which is totally ignored in the majority opinion, is precisely applicable here. The Commission's interpretation of its regulation—that it can and should look to the boundary of the densely populated area rather than to the political boundaries of a city—is neither plainly erroneous nor inconsistent with the words used. Indeed, as Judge Tone remarks, the Commission's decision is "the most sensible interpretation of the regulation" (App. p. 36).

The purpose of the population center distance regulation is, of course, to separate the reactor from concentrations of population, not to separate it from a city's political limits which may, as in this case, have no relation to population.[5] That purpose is reflected in the words of the regulation itself. Moreover, prior to June 20, 1975 subparagraph (a)(3), after defining the population center distance, continued:

> "In applying this guide, due consideration should be given to the population distribution within the population center."

That is what the Commission did here:

> "... giving due consideration to the low population density of those areas closer than 4.5 miles to the Bailly reactor, principally industrial areas of the

[5] That purpose was emphasized by the Commission when the regulation was adopted in 1962. The guidelines, it said, were intended to provide assurance "that the cumulative exposure dose to large numbers of *people* as a consequence of any nuclear accident should be low in comparison with what might be considered reasonable for total population dose. Further . . . it was considered desirable to provide for protection against excessive exposure doses to *people* in large centers, where effective protective measures might not be feasible." 27 Fed. Reg. 3509 (emphasis supplied).

> City of Portage, the provisions of Part 100 with respect to population center distance are satisfied." App. pp. 55-56.

The Commission has consistently interpreted its regulations to give controlling weight to the actual location of dense population and not to political boundaries.[6] In recent dicta in another proceeding, the Commission noted that "the 'nearest boundary of a densely populated center' will not necessarily coincide with city or other political limits, for densely populated areas may extend beyond such limits." *Southern California Edison Co.*, RAI-74-12, 957, 960-962 (1974). Curiously, the majority below agreed that the Commission properly interpreted the regulation to allow it to ignore the political boundary in that case, and to consider instead the distance to the boundary of the densely populated

[6] For example, in one proceeding where the population center distance formula would have required a distance of 1.3 miles and the nearest boundary of the City of Midland, Michigan was 0.21 miles, the Commission found the requirements of Part 100 satisfied since the "*populous areas* of Midland were sufficiently removed from the site vicinity" (emphasis added). Consumers Power Co., 5 A.E.C. 214, 218 (1972). In fact, the plant site was in the process of being annexed by the City of Midland, but, as the Commission found, this did "not affect the population distribution" and was thus, in essence, irrelevant. Similarly, in another proceeding the Part 100 guidelines were found to be satisfied when, although the nearest corporate boundary of a city with a projected population of 30,000 was 0.5 miles from the reactor, "the distance to the outer boundary of the more *densely populated area* [within the city] is about one mile" (emphasis added). Consolidated Edison Co., 5 A.E.C. 43, 45 (1972). The issue has, of course, not often arisen since in most cases there is no reason to determine the precise location of the dense population within the city or town and thus the Commission, for purposes of convenience, in discussing population center distance simply refers to the distance to the city or town.

area. We fail to understand why the Commission must be foreclosed from similar recognition of the facts and the purpose of its regulation when the boundaries are reversed.

If the Commission had intended to measure the population center distance to the nearest political boundary, it is reasonable to expect that it would have used terms such as "political subdivision" or "political entity." Indeed, both the Atomic Energy Act (*e.g.*, 42 U.S.C. § 2014(s)) and the Commission's regulations (*e.g.*, 10 C.F.R. §§ 2.101(b), 50.2(1)) use for other purposes terms such as "political subdivision," "political entity" and "municipality." Thus, the Commission was well aware of the proper terms to use when it intended to refer to such political bodies. But it did not use such terms here; rather, the regulations refer to a "*densely* populated center," not to just any populated center of more than 25,000 residents regardless of density of population. These terms—as Judge Tone pointed out (App. p. 37)—clearly reflect an intent to describe *de facto* concentrations of population rather than political entities.

It is appropriate to add that, as the regulations make clear, Part 100 "describe[s] criteria which guide the Commission" in evaluating the suitability of proposed sites for nuclear reactors (10 C.F.R. § 100.1(a)). That the Commission analyzed the site in terms of the criteria in the regulations is not in dispute.

2. The error of the court below is made even more apparent by the recent action of the Commission. On June 20, 1975 the Commission stated (40 Fed. Reg. p. 26526):

> "In defining the boundary [of the population center] consideration has not been confined to the location of the political or corporate boundary of the population center, but distribution of the people within and even beyond the corporate boundary has been given even greater significance."

Then, noting the decision below and that the "Commission is firmly of the opinion that continued implementation of its population center distance criterion is required" (*ibid.*), the Commission, in order "to restore and make clear the intended meaning of the rule" (*id.*, p. 26527) adopted, effective immediately, an amendment which "is interpretative in nature and reflects the current and consistent siting practice of the Commission" (*ibid.*), as follows:

> "(3) A population center distance of at least one and one-third times the distance from the reactor to the outer boundary of the low population zone. In applying this guide, the boundary of the population center shall be determined upon consideration of population distribution. Political boundaries are not controlling in the application of this guide. Where very large cities are involved, a greater distance may be necessary because of total integrated population dose consideration."

3. Because the majority below may have intended also to hold, alternatively, that the Commission's findings as to the boundary of the densely populated area are without adequate support in the record—the opinion, as Judge Tone notes (App. p. 37), is unclear—a word on that issue may be appropriate.[7] The finding that the

[7] The sufficiency of the evidence to support the Commission's findings that the boundary of the densely populated area was some 4.5 miles from the reactor was not challenged before the Appeal Board. The issue may not now be open. See App. p. 37, n. 2.

reactor would be 4.5 miles from a densely populated area is fully supported by United States Geological Survey maps depicting densely populated areas (Tr. 6374-6377, 6387-6390; Reg. Staff Exhs. 7, 9), together with extensive corroborative testimony (Tr. 10451 and unpaged testimony of Choate Brown immediately following; 10451; 10463; 10482 and unpaged testimony of Harley Snyder immediately following; Appl. Exhs. 31, 32). Moreover, respondents never have contended that there is in fact any densely populated area within two miles of the reactor. Indeed, as Judge Tone noted (App. p. 38), the area of the City of Portage within two miles of the reactor is principally zoned industrial, with a total population, according to the 1970 census, of not more than 81 people (Tr. 10685-10690; Appl. Ex. 32; U.S. Bureau of the Census, *Census of Housing; 1970 Block Statistics Final Report HC-3-6B* Chicago, Ill.—Northwest Indiana Urbanized Area (1972).

II

THE RESULT ACHIEVED BY THE DECISION BELOW SHOULD NOT BE SANCTIONED BY THIS COURT

The decision of the court below would nullify the years of work by the Commission and petitioner between 1970 and 1974 which finally resulted in the permit to construct N-1.

That the decision will, unless reversed, have important consequences in the area which petitioner serves is self-evident. The majority opinion recognizes the "vast consequences of shutting off or delaying a potential source of considerable energy in these times of energy crisis, together with the effect of such an occurrence upon the economic, financial and industrial well-being and development of northern Indiana" (App. p. 17).

Additionally significant, however, is that the decision which results in these consequences—to say nothing of the financial consequences to petitioner—will stand as an aberration in the law. The Commission's regulation of June 20, 1975 hopefully insures that no court will in the future hold that the Commission must measure population center distance from political boundaries.[8] Only petitioner will have been denied a construction permit contrary to the Commission's criteria.[9] Such a result should not be given sanction by this Court.

Finally, if the decision below is permitted to stand it will symbolize the sanctioning of judicial interference with a carefully conceived and carefully administered regulatory system designed to cope with a problem of overwhelming national importance. The Commission's authority "is virtually unique in the degree to which broad responsibility is reposed in the administer-

[8] Of course, were the decision below allowed to stand there would be no assurance that litigation would not arise with respect to other similar cases decided by the Commission on the basis of its criteria prior to the adoption of the interpretative amendment.

[9] The order of the court below on rehearing (App. p. 41) permits petitioner to apply for another permit for another nuclear reactor at the Bailly site. Particularly since the Commission on June 20, 1975 amended the interpretative regulation construed by the court below so as to reaffirm the Commission's original interpretation, there is every reason to expect that, if such a new application were to be filed, petitioner would ultimately be granted the very same permit that was taken away by the court's decision. Thus the only effect of the court's decision would be to subject petitioner and the Commission to the years of expense and delay associated with satisfying the procedural requirements (including public hearings and issuance of draft and final environmental impact statements) imposed under the Atomic Energy Act, NEPA and the Commission's implementing regulations. No conceivable public interest could be served by such a needless exercise.

ing agency, free of close proscription in its charter as to how it shall proceed in achieving the statutory objectives." *Siegel* v. *Atomic Energy Commission,* 400 F.2d 778, 783 (D.C. Cir. 1968); see also *Union of Concerned Scientists* v. *Atomic Energy Commission,* 499 F.2d 1069, 1077 (D.C. Cir. 1974). The suggestion that the majority's decision may be justified because the Commission may have "tended to become somewhat lax" (App. p. 17) ignores the relationship which must exist between the Commission and the courts if the Commission is properly to discharge its responsibility.[10] The possibility that the Commission's interpretation and application of its own comprehensive regulations can be thus summarily set aside—particularly in a proceeding which included the most painstaking and exhaustive review under both the Atomic Energy Act and NEPA during an administrative review period of more than four years and through public hearings lasting 14 months—will have a serious adverse impact on the entire program of nuclear power development and regulation.

CONCLUSION

The interpretative regulation adopted by the Commission on June 20, 1975 would seem to have removed any doubt that the majority below misconstrued the original intent of the Commission. There can be no question but that an interpretative regulation—propounded by the responsible administrative agency while

[10] In view of the error by the court below in determining that the Commission had violated its own regulations concerning population center distance, Part IV of the court's opinion—in which the court appears to consider whether the Commission should be required to obey those regulations—can only be deemed superfluous.

acting in a quasi-legislative capacity—is entitled to substantial, if not controlling, weight in interpreting the regulations pursuant to which petitioner's construction permit for N-1 was approved.[11]

Because the court below necessarily acted in ignorance of the Commission's clarification of its intent, one of the courses this Court could follow in this case would be to grant this petition for a writ of certiorari, summarily vacate the judgment below and remand the cause for further consideration in light of the Commission's June 20, 1975 action. This is the course which this Court has often followed where a relevant intervening legal development—whether decisional, statutory or regulatory—which casts doubt upon the continuing validity of a lower court's decision has occurred between the rendering of that decision and the filing or final decision of an application for certiorari. *See, e.g., Hunter* v. *Tennessee,* 403 U.S. 711; *Egan* v. *City of Aurora,* 365 U.S. 514; *cf. Thorpe* v. *Housing Authority of the City of Durham,* 386 U.S. 670. The Commission's pronouncement constitutes precisely the sort of significant intervening legal development which warrants, at the least, further consideration of this case by the court below.

[11] *Compare, e.g.,* N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 275 ("[S]ubsequent legislation declaring the intent of an earlier statute is entitled to significant weight" in construing the earlier statute). *Accord, e.g.,* Glidden Co. v. Zdanok, 370 U.S. 530, 541; F.H.A. v. The Darlington, Inc., 358 U.S. 84, 90; *cf.* Alan M. Campbell Co. v. Lloyd Wood Construction Co., 446 F.2d 261, 265 (5th Cir. 1971). Administrative regulations are, of course, interpreted in accordance with the same rules of construction as are applied in interpreting statutes. *See, e.g.,* Rucker v. Wabash R.R., 418 F.2d 146, 149 (7th Cir. 1969); Borelli v. Reconstruction Finance Corp., 196 F.2d 730, 736 (Emerg. Ct. App. 1952).

However, under the circumstances of this case as set out above, we believe the Court may conclude that the court below committed clear error in its construction of the Commission's regulation, and that the appropriate relief is a summary reversal and remand for such further proceedings as may be appropriate. *Cf., e.g., Mason* v. *City of Biloxi,* 385 U.S. 370; *Johnson* v. *Virginia,* 373 U.S. 61. Or, the Court may conclude that the cause should be set for briefs and argument.

Respectfully submitted,

CHARLES A. HORSKY
888-16th St., N.W.
Washington, D.C. 20006

WILLIAM H. EICHHORN
5243 Hohman Avenue
Hammond, Indiana 46320

MAURICE AXELRAD
1025 Connecticut Ave., N.W.
Washington, D.C. 20036

Attorneys for Petitioner

Of Counsel:

SCHROER, EICHHORN & MORROW
5243 Hohman Avenue
Hammond, Indiana 46320

COVINGTON & BURLING
888-16th St., N.W.
Washington, D.C. 20006

June 1975